In the Supreme Court of the United States

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No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Petitioners Union Oil Company of California and Industrial Asphalt, Inc.

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The following brief is the only one filed on behalf of the petitioners. Neither Gulf Oil Corporation nor Edgington Oil Company submitted a brief on the merits.

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OPINIONS BELOW

The opinion of the court below is reported in 487 F.2d 202 and is set out as Appendix B to the Petition for Writ of Certiorari. The opinion of the District Court is reported in 1972 Trade Cases ¶ 74,013 and is set out as Appendix A to the Petition.[1]

All emphasis in quotations has been added unless otherwise stated.

1. Appendices to the petition are hereafter referred to as "Pet. App." with page number. The single Appendix will be referred to simply as "App."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1292(b). Its judgment was entered October 3, 1973. Petition for Writ of Certiorari was filed December 28, 1973, and a writ was granted on March 25, 1974, ... U.S. ....., 94 S.Ct. 1586. The very questions at issue are whether the District Court had jurisdiction, which was invoked under Clayton Act § 4 (15 U.S.C. § 15) and 28 U.S.C. § 1337.

QUESTIONS PRESENTED

This case has to do with a commodity, asphaltic concrete—made in California in and around Los Angeles from California materials—sold and used in California in that area and by its nature incapable of being sold or used outside of the state or of being imported into California from without. Respondents, makers of the commodity in Los Angeles, sued petitioners, also located in California, claiming violation of the Robinson-Patman Act, Sections 3 and 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act. The District Court held that it lacked jurisdiction for want of the jurisdictional prerequisites of the several Acts relative to interstate commerce. The court below reversed solely upon the fact that asphaltic concrete is used as a topping for roads and streets in California, some of which are segments of interstate highways. For that reason it held that the producers of the commodity are "instrumentalities" of interstate commerce and, proceeding from that premise, it held that the producers were "in commerce" so as to satisfy the requirements of the several Acts "as a matter of law."

The questions as to which the Court granted the writ are as follows:

With respect to a commodity which is not only made and sold in one state alone but is only salable and usable in that state,

does the fact that it is used in an instrumentality of commerce such as a highway supply the necessary requirements, by itself and as a matter of law

(a) Of the anti-discrimination clause of the Robinson-Patman Act that the discriminatory sale be by a "person engaged in commerce, in the course of such commerce," that "either or any of the purchases involved * * * [be] in commerce," and that the "effect * * * may be substantially to lessen competition or tend to create a monopoly in any line of commerce"?

(b) Of Section 3 of the Clayton Act that the tying conduct be that of a "person engaged in commerce, in the course of such commerce" and that "the effect * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce"?

(c) Of Section 7 of the Clayton Act that the acquisition by a "corporation engaged in commerce" be of a corporation "engaged also in commerce," and that "the effect * * * may be substantially to lessen competition, or tend to create a monopoly", where the acquired corporation sold nothing in commerce and the product it made did not enter commerce?[2]

STATUTES INVOLVED

Title 28 U.S.C. § 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

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2. The Court did not grant the writ as to a fourth question, which read: "(d) Of Sections 1 and 2 of the Sherman Act that the restraint or monopolization be 'of trade or commerce among the several states or with foreign nations' where, factually, there is no effect on commerce?"

Section 1 (15 U.S.C. § 12):

" 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *."

Section 3 (15 U.S.C. § 14):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities * * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 (15 U.S.C. § 15):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 (15 U.S.C. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * * of any other corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * * *"

Robinson-Patman Act, Section 2(a), Act of June 19, 1936, c. 592,49 Stat. 1526, 15 U.S.C. § 13, subd. (a):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where ether or any of the purchases involved in such discrimination are in commerce * * * * where the effect of such dscrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * * *."

STATEMENT OF THE CASE

A. Basic Facts

Unless otherwise stated, the facts are taken from the opinions below (Pet. App. A and B). They are not in dispute.

Respondents (hereafter sometimes called "Copp") are Los Angeles merchants of asphaltic concrete, a substance used as "blacktop" for streets, roads and driveways. Copp sued petitioners and one other for treble damages, claiming violation of Sections 1 and 2 of the Sherman Act,[3] Section 2(a) of the Robinson-Patman Act,[4] and Sections 3 and 7 of the Clayton Act,[5] all in the marketing of asphaltic concrete in California in and around Los Angeles (Pet. App. 1-3).

Copp's complaint also claimed antitrust violations in the marketing of liquid petroleum asphalt (Pet. App. 1-3), and in this respect the complaint was similar to and part of the so-called *Western Liquid Asphalt Cases*, 350 F.Supp. 1369 (N.D. Cal. 1972), reversed *sub nom., State of Alaska v. Standard Oil Company of California*, 487 F.2d 191 (9 Cir. 1972), cert. denied, ...U.S....., 94 S.Ct. 1419 (Feb. 19, 1974). But proceedings occurred in the district court "to eliminate from the case the issues which are not

3. 15 U.S.C. §§ 1, 2.
4. 15 U.S.C. § 13, subd. (a).
5. 15 U.S.C. §§ 14, 18.

common to the remainder of the Western Liquid Asphalt Litigation," (Pet. App. 2), that is to say, to eliminate the aspects concerning asphaltic concrete and leave the case pending only as to liquid asphalt.

Unlike liquid asphalt, asphaltic concrete does not and cannot enter into interstate commerce. It is manufactured at facilities known as "hot plants" by combining about 95% of rock, sand, and other aggregates with about 5% liquid petroleum asphalt. The fundamental fact is that asphaltic concrete must be delivered hot and is of great weight and low value; therefore it can only be sold within 30 or 35 miles of the place of manufacture. Copp's plant was in suburban Los Angeles and competed with other Los Angeles hot plant operators. No hot plant in the Los Angeles area delivered or ever could deliver asphaltic concrete outside California. All such plants manufactured their product from aggregates mined at local pits and liquid asphalt manufactured at Los Angeles refineries (Pet. App. 1-3). As the District Court summed up (Pet. App. 3):

> "While liquid asphalt moves in interstate commerce, the liquid asphalt used by plaintiffs and their competitors all comes from the State of California, which is an exporter of liquid asphalt. The aggregates used likewise are produced in California. The jurisdictional problem arises out of the fact that plaintiffs and plaintiffs' competitors manufacture a product out of California raw materials for sale and delivery in California.
>
> * * *
>
> "As indicated, asphaltic concrete does not move in interstate commerce except under exceptional circumstances, none of which are present here."

Petitioners Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), and Edgington Oil Company ("Edgington") produced liquid petroleum asphalt, but they did not make or sell asphaltic concrete (Pet. App. 9-10).

Petitioner Industrial Asphalt, Inc. ("Industrial") and a fifth defendant, Sully-Miller Contracting Company ("Sully-Miller") were Los Angeles hot plant operators competing with Copp in the local asphaltic concrete trade. Unlike Sully-Miller, Industrial also was a marketer of liquid asphalt.

The Robinson-Patman charges made by the complaint with respect to asphaltic concrete are that Industrial and Sully-Miller sold that substance at discriminatory prices (Pet. App. 2).

The Clayton Act, § 3, charges are that Industrial and Sully-Miller sold asphaltic concrete pursuant to "unlawful extraction from customers of agreements not to use or deal in plaintiff's products or services" (Pet. App. 2).

The Clayton Act, § 7, charges are that Union acquired the capital stock of Sully-Miller, and that Gulf acquired Industrial (Pet. App. 10).

B. Proceedings in the District Court

As stated by the district court (Pet. App. 2):

> In December 1971 it appeared to the court that there were potential jurisdictional problems which should be decided prior to the large-scale discovery on the merits which the plaintiffs proposed. The court ordered that discovery be directed to the jurisdictional problems, * * *."

(And see also App. 49-50).

After discovery had disclosed all relevant facts and Copp had had full opportunity to develop them, Copp was directed by the court to point to some evidence of jurisdiction (Pet. App. 2). Copp's showing rested on two facts: (1) that some of the streets and roads in California in the 35 mile radius around Los Angeles are segments in the interstate highway system, although none of the parties supplied asphaltic concrete for use within two hundred miles of any interstate crossing of the California border; (2) a stipulation that the quantity of asphaltic concrete so used in those

roads and streets was not *de minimis* (Pet. App. 3). On these facts Copp offered the bare argument that "the use of asphaltic concrete in the interstate highway puts it 'in commerce'" (Pet. App. 3, 4). The district court rejected this argument. And no other jurisdictional theory being urged or supported, the court entered the following orders (Pet. App. 7-8):

> (a) As Sully-Miller neither produced nor marketed liquid asphalt, the order was a summary judgment of dismissal in its favor.
>
> (b) As the other defendants were marketers of liquid asphalt, a product shipped in interstate commerce, they were kept in the case with respect to all charges concerning that substance, but the charges concerning marketing of asphaltic concrete were carved out as was the charge about Union's acquisition of Sully-Miller. Because Industrial is also a marketer of liquid asphalt, the charge about Gulf's acquisition of Industrial was also left in the case.

C. Proceedings in the Court of Appeals

From this decision Copp was allowed an interlocutory appeal to the court below under 28 U.S.C. § 1292(b). That court reversed (Pet. App. 15), saying:

> "We hold that the production of asphalt for use in interstate highways rendered the producers thereof 'instrumentalities' of interstate commerce and placed them 'in' that commerce *as a matter of law*." (Pet. App. 10)

In short, although asphaltic concrete in the Los Angeles area can be made solely in California from California materials, is and can be sold and used only in California, and cannot be sold or used outside that state, the court held that there was jurisdiction of all the claims asserted in the complaint as amended. And it held all this, *as a matter of law*, solely because California roads and streets in which the asphaltic concrete is used are segments of a highway system that is interstate.

The court did not pass on the dismissal of Sully-Miller; it held (Pet. App. 15) that as the dismissal was a complete disposition of the case against Sully-Miller, an appeal could be taken from that part of the order only under F.R.Civ.P. Rule 54(b), and, as no order under Rule 54(b) had been made, no appeal lay.[6] Consequently, Sully-Miller is not before this Court.

D. The Issues Before This Court

Since the Writ was not granted as to the Sherman Act questions (see fn. 2 at p. 3, above), and since the case as it comes here has nothing to do with the claims concerning liquid petroleum asphalt, petitioners Gulf and Edgington are not concerned with the issues before this Court. They neither make nor sell asphaltic concrete and were involved in the appeal only because of the Sherman Act charge that they were co-conspirators in the alleged conspiracy to fix prices of asphaltic concrete. The issues now before the Court are:

1. Whether the prohibitions of the Robinson-Patman Act against price discrimination and of Clayton Act, § 3, against tying, apply to Industrial in the sale of asphaltic concrete.

2. Whether the Celler-Kefauver Act (Clayton Act, § 7) applies to Union's acquisition of the stock of Sully-Miller.

SUMMARY OF THE ARGUMENT

I.

Two basic considerations are common to the several statutes involved in this case: (1) by the Robinson-Patman and Clayton

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6. Rule 54(b) provides that where there are multiple parties to a case, an order disposing of the case as to fewer than all the parties is not appealable unless the order specifies that there is no just reason for delay, and expressly directs the entry of judgment. The court below evidently believed that compliance with this requirement of Rule 54(b) was missing. While we think the court erred in holding that an appeal did not lie also under 28 U.S.C. § 1292(b), the petition for certiorari did not present that question inasmuch as disposition of the issues as to the other parties would also settle the law as to Sully-Miller.

Acts Congress did not exercise all its constitutional power under the Commerce Clause, as it is said of the Sherman Act, but confined the reach of each of these Acts by explicit language. (2) As the governmental structure of the Nation is federalism, the reach of federal statutes should not be stretched beyond the fair intendment of their language where to do so would impose on local affairs standards of conduct in conflict with state policy.

II.

Relative to the Robinson-Patman Act: Jurisdiction under Robinson-Patman is far narrower than under the Sherman Act. While the latter is concerned with effect or impact of conduct regardless of where the conduct occurs, effect or impact is but one of four tests of jurisdiction all mandated by the express terms of the Robinson-Patman Act. The other three are that the act of discrimination be by a person "engaged in commerce", "in the course of such commerce", where there are two or more sales at least one of which is "in commerce". The unbroken mass of authority, until the decision below, is that "at least one of the two transactions which, when compared, generate a discrimination, must cross a state line". Here no sale did.

The court below dismissed the "state line test" because the commodity sold is used in roads—at least 200 miles from any interstate border—and is therefore "linked to an instrumentality of commerce." To translate that notion of "instrumentality" into the statutory requirement of "in commerce", the court started with the analogy of the Fair Labor Standards Act. But, while that Act by its terms applies where the employees are either "engaged in commerce" or "engaged in the production of goods for commerce", Robinson-Patman does not offer the alternative of "engaged in the production of goods for commerce". In *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953), this Court held that, while workers supplying commodities used in repairing roads are

not "engaged in commerce", they are "engaged in production of goods for commerce" for purposes of the Fair Labor Standards Act in view of the particular legislative history of that Act. The court below fallaciously jumped to the conclusion that for the purposes of a different Act such employees are "engaged in commerce", a quite different concept. If instead of selling asphaltic concrete to the road builder or repairman, petitioner Industrial had itself built or repaired roads at discriminatory charges, its conduct would not fall within the Robinson-Patman Act because no sale of goods would be involved. *General Shale Products Co. v. Struck Constr. Co.*, 132 F.2d 425 (6 Cir. 1942), cert. denied, 318 U.S. 780 (1943). Yet, here, where its conduct was one step farther away from the roadwork, the decision below has brought it within the Robinson-Patman Act by transmuting the "engaged in the production of goods for commerce" of a different Act into the "engaged in commerce" of Robinson-Patman.

Not only was the leap from "engaged in production of goods for commerce" to "engaged in commerce" unwarranted, there was no basis for looking to the Fair Labor Standards Act at all. The "translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business" and particularly unwarranted where it would extend federal control over local matters. *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 353 (1941). The economic and social philosophy underlying Robinson-Patman is one of the most hotly criticized in trade regulation, for it conflicts with the goal of hard competition of the Sherman Act and like state legislation. *E.g., Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 249 (1951). Therefore California has deliberately rejected and refused to enact Robinson-Patman type legislation. *Harris v. Capitol Records Distributing Corp.*, 64 C.2d 454, 413 P.2d 139 (1966). The explicit jurisdictional limitations of Robinson-Patman should not be relaxed so as to impose on California trade regulation for local affairs that California has rejected.

III.

Relative to Clayton Act, § 3: This statute contains a similar requirement as to effect as Robinson-Patman and the identical requirement that the conduct be by "a person engaged in commerce, in the course of such commerce". The court below upheld jurisdiction of the Section 3 claim on the same reasoning as the Robinson-Patman claims. Its decision must fail for the same reason. It is in direct conflict with *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972), and not in accord with the jurisdictional requirements of Section 3 as taught in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1947).

IV.

Relative to Clayton Act, § 7; the anti-merger Act: Like the other two Acts, this requires, in addition to the effect on commerce, that *each* of the acquiring and acquired corporations be a "corporation engaged in commerce". Here the acquired corporation was not, it being a wholly local manufacturer of a product from local materials selling it locally to be affixed, or affixing it, to local real estate.

State and federal policy differ about prohibiting acquisitions on the "incipiency" philosophy of Section 7. The consequences of acquisition by an interstate corporation of other such corporations can be quite different from that of an acquisition of a local concern, for local acquisitions are often the means by which local communities grow. The distinction is recognized by authorities. For that reason the new Uniform State Antitrust Act contains no anti-merger provisions. Section 7 should not be subjected to subtleties of interpretation that inject it into local affairs contrary to local policy.

The decision below treats the acquired corporation as "in commerce" by the same reasoning employed in its decision of the Robinson-Patman question, and it is equally fallacious here.

In *United States v. American Building Maintenance Industries*, No. 73-1689, on appeal to this Court by the United States, the government argues that Section 7 should be read as if the sole jurisdictional requirement were one of "affecting commerce". But Section 7 contains the double requirement of effect on commerce and "in commerce", and the latter cannot be jettisoned on an argument that Congress would be justified in broadening the reach of the statute. In limiting the statute, Congress gave recognition to the various considerations competing for attention. By 1950, when the Section was thoroughly rewritten and expanded into the Celler-Kefauver Act, the wide distinction between "in commerce" and "affecting commerce" was well established; nevertheless the double test of jurisdiction was retained.

Finally, the acquisition had no effect of lessening competition or tending to create a monopoly in a line of commerce. It was the duty of the district court to determine the existence of this jurisdictional element, and on all the evidence it found not even an issue of fact on the matter.

ARGUMENT

I. Basic Considerations Common to the Three Statutes Involved

We shall separately discuss the situation as respects each of the three statutes involved, the Robinson-Patman Act and Sections 3 and 7 of the Clayton Act. But two basic considerations pertain to all three.

First: Although, as it has been said, by the Sherman Act Congress exercised all the constitutional power it possesses under the Commerce clause, Congress plainly did not do so in enacting any of the three statutes now before the Court. By the most explicit selection of language, the reach of each of these statutes was confined.

Second: The governmental structure of this Nation is one of federalism. The Court has reemphasized that truth and its consequences in the recent past, *Younger v. Harris*, 401 U.S. 37, 44

(1971). There are subject matters on which federal view and state view of sound policy conflict. Where a federal statute *both* plainly applies to a situation and can do so constitutionally, it is paramount. Where interpretation of the reach of the federal statute is debatable, due regard to "our federalism" counsels restraint. And in no event should federal statutes be subjected to procrustean treatment in order to direct what are essentially local affairs in a manner in conflict with state policy; the reach of federal statutes should not be expanded cavalierly where to do so is to impose on local affairs standards of conduct in conflict with state policy. The Court has stated these fundamentals at length in the very context of federal laws resting on the Commerce Clause, in *Kirschbaum v. Walling,* 316 U.S. 517 (1942) where it said (p. 520): "Federal legislation of this character cannot therefore be construed without regard to the implication of our dual system of government." And in *Younger v. Harris, supra,* the Court, per Mr. Justice Black, said (p. 44)

> "* * * the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This * * * is referred to by many as 'Our Federalism,' * * *. The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. * * * What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

In short, the question in cases like this is not how far Congress could go, but how far it has gone, and in deciding that question respect must be paid both to the language Congress chooses to express its wish and to the federal structure of the Union, and

with wary appreciation that "[t]he federal camel has a tendency to occupy permanently any State tent."[7]

II. There Was No Jurisdiction of the Robinson-Patman Claim of Price Discrimination

To recapitulate, the Robinson-Patman claim is that Industrial sold asphaltic concrete at discriminatory prices (Pet. App. 2), but all its sales from its California plants,[8] and all of Copp's, occurred in California and were sales of California produced materials (Pet. App. 3, 9-10). Not only were they; they had to be, because asphaltic concrete is made from local rock, sand, and asphalt and must be sold and used within a very short time after it is manufactured and within a few miles of where it is made.

A. BY EXPRESS TERMS, THE ROBINSON-PATMAN ACT IS OF LIMITED REACH

Jurisdiction under Robinson-Patman is much narrower than under the Sherman Act. The contrast has been made repeatedly in the cases. The Sherman Act reaches conduct "in restraint of trade or commerce" or which monopolizes or attempts to monopolize or restrain trade or commerce; it is concerned with the effect or impact of an act regardless of where the act occurred. *E.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948). But it is not so with respect to the Robinson-Patman Act. "Jurisdiction under the Robinson-Patman Act is very different from jurisdiction under the Sherman Act," *Lehrman v. Gulf Oil Corp.,* 464 F.2d 26, 36 (5 Cir.), cert. denied, 409 U.S. 1077 (1972). Or, as said in *Walker Oil Company v. Hudson Oil Company of Missouri,* 414 F.2d 588, 589 (5 Cir. 1969), cert. denied, 396 U.S. 1042 (1970), "We note initially that the juris-

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7. Douglas, J. in *Federal Power Commission v. Florida Power & Light Co.,* 404 U.S. 453, 476 (1972).

8. Industrial also operated two plants outside California, but all its plants sold and delivered asphaltic concrete only locally within the state of manufacture. (See App. 117).

dictional commerce coverage of this section falls short of the coverage possible under Congress's Commerce Clause power or that of the broader Sherman Anti-Trust Act".

If Robinson-Patman had proscribed discriminatory sales wherever the effect may be substantially to lessen competition or tend to create a monopoly in a line of commerce, arguments about jurisdiction similar to those applicable to the Sherman Act would be germane. But *effect* is only one of four tests of that Act. The Act not only requires that the effect of the alleged discrimination may be to substantially lessen competition or tend to creat monopoly in any line of commerce, but it also imposes three other limitations:

> (1) The act of discrimination must be by a person "engaged in commerce";
>
> (2) The act of discrimination must be committed "in the course of such commerce * * *
>
> (3) where either or any of the purchases involved in such discrimination are in commerce."

Thus there must be (1) the *effect* on commerce, (2) resulting from an act committed by one engaged in commerce, where, in addition, (3) that act occurs in the course of the commerce and where, further, (4) the act consists of two or more sales at least one of which is in commerce.

These express restrictions of the Act cannot be escaped. They plainly require that at least some of the sales complained of cross state lines. *E.g., Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 236-238 (1951); *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 118-120 (1954). The plain meaning of the statutory language is found in the statement of Congressman Utterback, manager of the bill in the House (80 Cong. Rec. 9417):

> "Where, however, a manufacturer sells to customers *both within the State and beyond the State,* he may not favor either to the disadvantage of the other; he may not use the

> privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade."[9]

Rowe, *Price Discrimination Under the Robinson-Patman Act,* pp. 77-83 states, with much citation:

> "Courts apply Sherman Act proscriptions to restrictive or monopolistic business activities wherever they occur, so long as interstate commerce is 'affected.' On the other hand, the price discrimination clauses of Robinson-Patman require that the discriminator be 'engaged in commerce,' that the challenged discrimination occur 'in the course of such commerce,' and that 'either or any of the purchases involved in such discrimination are in commerce . . .' Any broader interstate commerce reach of Robinson-Patman is refuted by its legislative history, for the Senate-House Conference struck a clause in the House bill which would have adopted the 'effect on commerce' criterion."

In *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.,* 469 F.2d 416, 418 (5 Cir. 1972), the court observed that the "failure of any party to have any interstate business disposes of the Clayton and Robinson-Patman Act claims." The same court, sitting *en banc* in *Littlejohn v. Shell Oil Company,* 483 F.2d 1140, 1144, cert. denied, 414 U.S. 1116 (1973), referred to at least one interstate sale as the "sine qua non" of Robinson-Patman jurisdiction.

Repeatedly courts have used these words:

> "At least one of the two transactions which, when compared, generate a discrimination, *must cross a state line."*

Belliston v. Texaco, Inc., 455 F.2d 175, 178 (10 Cir.), cert. denied, 408 U.S. 928 (1972); *Walker Oil Company v. Hudson Oil Company of Missouri,* 414 F.2d 588, 589 (5 Cir. 1969), cert. denied,

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9. This is quoted in *Moore v. Mead's Fine Bread,* supra, at 120.

396 U.S. 1042 (1970); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37 (5 Cir.), cert. denied, 409 U.S. 1077 (1972); *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7 Cir. 1973), cert. denied, ... U.S. ...., 94 S.Ct. 899 (1974); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208-09 (5 Cir. 1969).

Accord: Borden Co. v. Federal Trade Commission, 339 F.2d 953 (7 Cir. 1964); *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943 (6 Cir. 1962), cert. denied, 373 U.S. 934 (1963), and many others.

B. A SUPPLIER OF A SUBSTANCE USED IN A ROAD IS NOT THEREBY IN COMMERCE NOR IS THE INTRASTATE SALE TO THE USER A SALE IN COMMERCE

The court below refused to follow this settled law which it belittled as a mere "state line test". By a chain of reasoning consisting of five links, it concluded that the "in commerce" requirements of the Act were met although nothing crossed a state line. The chain of reasoning is not spelled out, but it is implicit, and every link must be sound or the chain will not hold. We examine each.

1. The First Link in the Chain of Reasoning Below and Its Unreality

The first link is to say that, as asphaltic concrete is incorporated in local physical objects—roads—over which commerce passes, the asphaltic concrete is "closely linked to an instrumentality of interstate commerce" (Pet. App. 14-15). But the Robinson-Patman Act says nothing about "instrumentalities of commerce". Because it requires that the alleged discriminatory sales be by a person "engaged in commerce, in the course of such commerce * * * where either or any of the purchases involved in such discrimination are in commerce," the court below was under the necessity of translating the notion of "instrumentality of commerce" into the concept of "in commerce".

We submit that this very first link is forged from unreality. In *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), which arose under the Fair Labor Standards Act, the Court said (p. 128):

> "And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations."

In *United States v. Yellow Cab Company*, 332 U.S. 219 (1947), dealing with the Sherman Act, where the test of jurisdiction is far less restrictive than under the Clayton Act, the Court held that a restraint on transportation of passengers and their luggage between railroad stations in Chicago on an interstate journey was a restraint on interstate commerce, but that a restraint on the service of taxicabs in conveying interstate passengers between their homes and railroad stations was not. Acknowledging that, in a sense, a traveler begins his interstate journey when he boards a conveyance near his home, hotel or office and ends it when he alights from a conveyance at his ultimate destination:

> "But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." (p. 231)

In the present case the smooth statement that the asphaltic concrete is used in segments of the interstate highway system, while literally true, inflates reality. *Overstreet* involved a drawbridge which, when down, blocked an interstate waterway, and a toll road which was the only available interstate passage between two points. But here *not one of the roads or streets blacktopped by the asphaltic concrete in this case is within 200 miles of where any highway crosses the California border into another state.* To assert that the asphaltic concrete is linked to an instrumentality of interstate commerce in any real sense is simply not a practical concept.

But assuming that the first link is sound, the next three by which the court reaches the conclusion that both the parties and the sales are "in commerce" are rankly fallacious.

2. The Second Link

The court turned to the Fair Labor Standards Act (Act of June 25, 1938, c. 636, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201, et seq.), the pertinent provision of which is Section 6(a) (29 U.S.C. § 206(a)):

> "Every employer shall pay to each of his employees who in any workweek is engaged *in commerce or in the production of goods for commerce,* or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: * * * *"[10]

The court below turned to *Alstate Construction Co. v. Durkin,* 345 U.S. 13 (1953) for its holding that, for purposes of the Fair Labor Standards Act, an employee "is engaged in the production of goods for commerce" if the goods he makes enter into an instrumentality of commerce. But this Court so held only because of the legislative history of that particular Act. As the bill passed the Senate, it required not only that the goods be produced for commerce but that the production must be "of goods for transportation in commerce". It was because "Congress left those words out of the bill as passed" that this Court, over a strong dissent, reached its conclusion about the meaning of the words as used in that Act (345 U.S. at 15).

3. The Third Link

But, even if it were permissible upon the basis of *Alstate* to characterize a maker of asphaltic concrete as one "engaged in the production of goods for commerce," that falls short of supporting jurisdiction under Robinson-Patman. The Fair Labor Standards

10. Until 1966, the words "or is employed in an enterprise engaged in commerce or in the production of goods for commerce" were not in Section 6(a). They were incorporated into the Act in 1961 in a Section 6(b) (Act of May 5, 1961, Pub. L. 87-30, § 5, 75 Stat. 67). In 1966 the words were transferred to Section 6(a) (Act of Sept. 23, 1966, Pub. L. 89-601, Tit. III, 80 Stat. 838-840).

Act confers jurisdiction in the alternative, either where the employee is "engaged in commerce" or where he is "engaged in production of goods for commerce." But, unlike the Fair Labor Standards Act, the Robinson-Patman offers no alternative to "in commerce"; it permits no fall-back to "production of goods for commerce". Either a sale is "in commerce" or the Act does not apply.

The next link in the chain of reasoning below was to recast the proposition that "one is engaged in the production of goods for commerce" into a quite different statement that he is thereby "engaged in commerce". That is a false step, and it is shown to be false by the *Alstate* case itself. In *Alstate* the question was whether workers engaged in supplying commodities used in repairing roads could claim the minimum wage protection of the Fair Labor Standards Act. This Court recognized as a premise that these workers are not "engaged in commerce". It was for that reason it looked further, to the provision that the Act applies also to those engaged "in the production of goods for commerce". Thus what this Court regarded as two separate concepts the court below silently treats as one.

In the *Alstate* case Justices Douglas and Frankfurter dissented from the holding that those engaged in working on roads were even engaged in "production of goods for commerce"; the opinion of Mr. Justice Douglas said (345 U.S. at 17):

> "The Court reasons that if the man who is building or repairing an interstate highway is 'engaged in commerce,' the one who carries cement and gravel to him from a nearby pit is 'engaged in the production of goods for commerce.' Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel? Each would be essential to the highway worker 'engaged in commerce.' Yet the circle gets amazingly large once we say that 'the production of goods for commerce' in-

cludes the 'production of goods for those engaged in commerce.' "

We quote this passage to show that the holding of *Alstate* that "production of goods for those engaged in commerce" embraces "production of goods for commerce" offered difficulties. Yet, in the present case, the court below has made the leap that those supplying goods for use of those in commerce are themselves "in commerce," and it has done so in the teeth of the fact that the Robinson-Patman Act contains its own very express limiting language, whereas limiting language in the bill that became the Fair Labor Standards Act had been deleted before passage.

4. The Fourth Link

Fallacious as is the third step of the reasoning, there is still a fourth step. The court below tacitly recast the holding that an employee is engaged in commerce into one that the employer is so engaged. Yet *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), dealing with the Fair Labor Standards Act, shows that the two are not synonymous, although for some purposes they may be. In *Overstreet* the employees seeking the minimum wages provided for by the Fair Labor Standards Act were operators, repair and maintenance workers, and the like on a toll road and drawbridge across the Intercoastal Waterway, which had to be raised frequently to permit the passage of boats in interstate commerce, and the toll road and bridge were the only means of certain interstate land transportation. The Court held that the fact that the employer was not engaged in commerce but only in providing facilities which those carrying on commerce may use (p. 131) was not reason to hold that the employees were not engaged in commerce. "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the [Fair Labor Standards] Act depends on the character of the employees' activities" (p. 132). In *Mitchell v. Lublin, McGaughy & Asso.*, 358 U.S. 207, 211 (1959) the Court reiterated, with

respect to the issue whether "employees are 'engaged in commerce' as that term is used" in the Fair Labor Standards Act, that "[t]o determine the answer to this question, we focus on the activities of the employees and not on the business of the employer." Congress recognized that the fact that some employees are "in commerce" or "engaged in the production of goods for commerce" does not necessarily mean that the employer is. In 1961 Congress enlarged the Fair Labor Standards Act to cover those "employed in an enterprise engaged in commerce or in the production of goods for commerce" (see fn. 10 at p. 20, supra). Then, by also adding subdivision (s) to Section 3 (29 U.S.C. § 203), it specified that " 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce * * *." Thereby, if some employees are engaged in commerce or in the production of goods for commerce, all employees of the same employer come under the protection of the particular Act. The quoted portion of the definition of Section 3(s) would have been unnecessary if the fact that an employee is "in commerce" necessarily meant that the employer also is. This history again illustrates that in every case where Congress acts under the Commerce Clause the question does not stop with deciding how far Congress can constitutionally go; it turns also on how far it did go by the particular statute.

5. The Fifth Link

Moreover, the reasoning below ignores the fact that Robinson-Patman spells out not one but three requirements about "in commerce" in addition to its requirement about effect on commerce. The person who commits the act of discrimination must be "in commerce", but that is not enough. In addition, not only must the act of discrimination be commited "in the course of such commerce" but at least one of the sales involved in the discrimination must be in commerce. Congress cannot be charged with having tautologically specified the same requirement three times. Conse-

quently, even were it to be assumed that the chain of reasoning correctly brought the court below to the conclusion that Industrial was "in commerce", that reasoning cannot bring it to the conclusion that any of the "purchases involved in such discrimination are in commerce." The thrust of the statute is to eliminate discrimination between sales at least one of which must be in commerce. And a sale is not in commerce unless something crosses a state line.

The decision below is seen to be all the more anomalous when it is recalled that, if Copp were complaining that Industrial, while engaged in repairing or constructing highways (instead of merely selling asphaltic concrete), charged different rates to different contracting agencies, that complaint would not fall under the Robinson-Patman Act at all, for construction of a section of pavement is not the sale of a commodity. *General Shale Products Co. v. Struck Const. Co.*, 132 F.2d 425 (6 Cir. 1942), cert. denied, 318 U.S. 780 (1943). Yet here, where Industrial's act was one step farther away from the roadwork, the decision below has brought it within the Act.

In *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7 Cir. 1973), cert. denied, ... U.S. ....., 94 S.Ct. 899 (1974), plaintiff was a local asphaltic concrete producer and paving contractor seeking treble damages on purchases of crushed aggregates which it used in both paving and in the manufacture of asphaltic concrete. (Petition for Certiorari in this Court in No. 73-671, pp. 4, 7.) The Seventh Circuit affirmed a judgment directed for defendants because all the sales deemed relevant occurred in Illinois, saying (p. 767):

> "Initially, we should note that the scope of the Robinson-Patman Act amendments to the Clayton Act is significantly different from the Sherman Act's in this very requirement that one sale be 'in commerce.' * * * In contrast to the specific requirements of the Robinson-Patman Act, 'it appears settled that only those activities are beyond the reach of the Sherman Act which are "purely local" in the double sense that they (1) are not within the flow of interstate commerce and (2) have no significant effect on that flow.' * * * Thus, we do not presently need to consider whether Congress has the power to reach such discriminations as are alleged by Mayer Paving. What we must determine is whether Congress intended to reach such discriminations."

Mr. Justice Tom C. Clark, sitting by designation, dissented because defendant had shipped large quantities of crushed limestone from Illinois at discriminatory prices to asphalt manufacturers and paving contractors in Indiana, but he acknowledged that a complete lack of interstate sales, as here, is fatal to a Robinson-Patman claim. Said he (486 F.2d at 773):

> "This Circuit, I submit, correcly held that Borden's being in interstate commerce was not enough; 'it must also be shown that the sale complained of was one occurring in interstate commerce.' 339 F.2d 953, 955."

Here neither Copp nor Industrial sold or shipped in interstate commerce.

C. THE DECISION BELOW INTERPRETS THE ACT IN A MANNER UNWARRANTABLY INTRUDING ON THE PUBLIC POLICY OF CALIFORNIA

We have just submitted that, even if it were permissible to look for light to decisions under the Fair Labor Standards Act, the decision below fails. But there is no basis for looking to the Fair Labor Standards Act at all. That is precisely the kind of course which this Court rejected in *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941). There the Federal Trade Commission sought to extend the authority granted by Section 5 of the Federal Trade Commission Act over "business practices employed in *interstate commerce*" (p. 350) to local affairs by analogy to the authority accorded the Interstate Commerce Commission in the *Shreveport* case.[11] The invitation to "thus give a federal agency pervasive control over myriads of local businesses

11. *Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914).

in matters heretofore traditionally left to local custom and control" was declined, this Court observing that "translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." 312 U.S. at 353-55.

This must be all the more true if proper regard is to be paid to our federalism, as *Bunte* emphasized (p. 351):

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§ 2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U.S.C. §§ 152(7), 159 (c), 160(a); Bituminous Coal Act, § 4—A, 50 Stat. 83, 15 U.S.C. § 834; Federal Employers' Liability Act, § 1, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51. * * * But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated.
>
> * * *
>
> "The problem now before us is very different from that which was recently presented by *United States v. Darby,* ante, p. 100. We had there to consider the full scope of the constitutional power of Congress under the Commerce Clause in relation to the subject matter of the Fair Labor Standards Act. *This case presents the narrow question of what Congress did, not what it could do.*" (p. 355)

California has no Act like the Robinson-Patman, not because of oversight or inaction but because California has deliberately rejected the social or economic policy on which Robinson-Patman rests. The economic philosophy underlying statutes of the Robinson-Patman type is one of the most hotly debated and criticized in the whole sweep of trade regulation; no legislation has created more confusion and difficulties in the effort to apply it to day-to-

day transactions. No subject has cried more for the most careful consideration of legislatures. It is fundamental public policy of California, as well as of federal antitrust laws, to promote competition through prohibition of methods which lead to price uniformity. Under the Sherman Act and California's "little Sherman Act", the Cartwright Act (Cal. Bus. & Prof. Code § 16,720), price uniformity is suspect. Yet price uniformity is the designed purpose and necessary consequence of price discrimination legislation like Robinson-Patman. In *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 249 (1951), this Court cited economists that "in theory the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts." In *Automatic Canteen Co. v. Federal Trade Commission,* 346 U.S. 61 (1953), the Court noted that enforcement of the Robinson-Patman Act might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (p. 63) that the Act may rest upon and create "policies in conflict with those of the Sherman Act" (p. 74). The leading work on the Robinson-Patman Act, Rowe, *Price Discrimination Under the Robinson-Patman Act,* (Little, Brown & Company, 1962) comments (pp. x, xi) on "the clashes of public policy surrounding its enforcement," and adds:

> "Critics denounce the Act, in important areas of its application, as an anti-antitrust law incompatible with the Sherman Act's mandate of free and competitive pricing as the prime instrument of economic progress for the benefit of the consumer."

Mr. Justice Jackson called the statute "complicated and vague" to a degree "almost beyond understanding." *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 483 (1952). Professor Corwin D. Edwards, formerly Chief Economist of the Federal Trade Commission, in a speech to a meeting of the Antitrust Section of the American Bar Association in April 1964 (24 A.B.A. Antitrust Section, p. 70) spoke at length on the conflict

between the policies and purposes of the Sherman and Robinson-Patman Acts:

> "In the business community, in the bar and in Congress, there is a deep cleavage of opinion between those who consider the Robinson-Patman Act an invaluable and indeed an indispensable safeguard, both for small business and for the maintenance of competition, and those who consider it as destructive of competition. * * * Similar differences of opinion and fluctuation of opinion are evident in Congress . . ."[12]

With these criticisms in mind, the legislature of California has several times declined to enact a Robinson-Patman kind of price discrimination law. In *Harris v. Capitol Records Distributing Corp.*, 64 C.2d 454, 413 P.2d 139 (1966), a unanimous court, affirming a summary judgment of dismissal, recognized that the legislature had declined to enact Robinson-Patman legislation and refused to interpret certain legislation as having that effect.

We submit that the jurisdictional limitations of the Robinson-Patman Act cannot and should not be relaxed so as to impose on California trade regulation for local affairs that California has rejected. It need not be asked whether Congress could do so, for it has not done so. The language of the Act is plain.

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12. Senator Keating of New York, later a justice of the New York Court of Appeals and still later Ambassador to India and then to Israel, in an address at the same session of the Antitrust Section, said (24 A.B.A. Antitrust Section, p. 60) (italics in original):

> "At the outset, do we need *any* price discrimination legislation as such? Can there be such legislation without limiting the haggling in the marketplace that is essential to free and competitive pricing?
>
> * * * *
>
> "It is a myth that Robinson-Patman is the Magna Carta of small business. * * *
>
> "It is a myth that Robinson-Patman commands the respect of the business community. * * *" (p. 62)

III. There Was No Jurisdiction of the Claim Under Section 3, Clayton Act

Invoking Clayton Act § 3 (15 U.S.C. § 14), Copp claimed that Industrial sold asphaltic concrete pursuant to "unlawful extraction from customers of agreements not to use or deal in plaintiffs' products or services." Copp's products and services were and could be sold and used only in California in and around Los Angeles (Pet. App. 2-3), and Industrial's sales of asphaltic concrete were similarly circumscribed.

Clayton Act, § 3, is similar to Robinson-Patman in its requirement of effect.[13] Additionally, it requires, in the same language as Robinson-Patman, that the conduct be by a "person engaged in commerce, in the course of such commerce". The court below upheld jurisdiction on the same ground as it upheld jurisdiction of the Robinson-Patman claim (Pet. App. 13-14), and its decision must fail for the same reasons. It is in direct conflict with *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972). There the court held (p. 418) that the lack of any interstate sales "disposes of the Clayton Act * * * claims."

This Court addressed itself to the jurisdictional provisions of Section 3 in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1947). That case involved a vast program of exclusive dealing arrangements imposed throughout seven western states. Dealers in states outside California, buying products shipped to them from California, and California dealers, buying some products shipped to them from without the state (p. 314), were bound by the exclusive dealing contracts, so that the requirements of a

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13. In Robinson-Patman: "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * *."

In Clayton Act, Sec. 3: "where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

"person engaged in commerce, in the course of such commerce" were obviously present, and the case turned on "effect", as to which the Court said (337 U.S. at 314-5):

> "But the effect of appellant's requirements contracts with California retail dealers is to prevent them from dealing with suppliers from outside the State as well as within the State and is thus to lessen competition in both interstate and intrastate commerce. Appellant has not suggested that if these dealers were not bound by their contracts with it they would continue to purchase only products originating within the State."

The import of this statement is clear: the Act is not violated unless the commodities subject to the arrangement move in interstate commerce or the arrangements preclude the making of interstate sales. In the instant case, however, interstate commerce in asphaltic concrete made in and around Los Angeles does not and cannot exist.

IV. There Was No Jurisdiction of the Claim Under the Celler-Kefauver Act (Clayton Act, § 7)

Copp charged violation of Section 7 of the Clayton Act (15 U.S.C. § 18) by Union's acquisition of the capital stock of defendant Sully-Miller, a manufacturer and seller of asphaltic concrete and a paving contractor doing no interstate business of any kind (Pet. App. 7).

What is before the Court is whether the jurisdictional requirements of Section 7 relative to commerce are satisfied.[14] That same question has been presented to the Court in a government suit, *United States of America, appellant, v. American Building*

14. It is to be noted, *in limine*, that the questions whether a private party can base a claim for damages upon an acquisition violative of Section 7, and, if so, in what circumstances, are open questions some day requiring settlement by this Court. They are not, however, before the Court in this case because they were not passed on by either court below and therefore could not be presented in the petition for certiorari.

Maintenance Industries, No. 73-1689, in which the government's Jurisdictional Statement was filed May 10, 1974.

The situation with respect to Section 7 is much the same as discussed above with respect to Robinson-Patman. There is the same requirement of *effect*, in language almost identical with Robinson-Patman.[15] But *effect* is not enough. Also like Robinson-Patman, Section 7 prescribes more. The acquisition must be by a "corporation engaged in commerce". But even that is not enough. In addition, the acquired corporation must be "engaged also in commerce."

Here Union, the acquiring corporation, is a corporation "engaged in commerce". But Sully-Miller, the acquired corporation, is not. It is a hot plant operator, making asphaltic concrete locally from local materials, selling it locally to be affixed to local real estate or itself laying down the paving.

Here, as in the case of Robinson-Patman, state and federal policy do not coincide, and they diverge because a macroscopic merger or acquisition can have a different significance from a microscopic one. Congress has decided that the consequence of mergers or acquisitions by corporations engaged in commerce of others so engaged is injurious to the national weal if certain effects are even incipiently present. But local acquisitions may be the very means by which local communities grow, so that anti-merger legislation like Section 7 serves the public interest ill. In 1955, the Report of the Attorney General's National Committee to Study the Antitrust Laws observed (pp. 124, 125):

> "Summing up, then, mergers are a common form of growth; they may lessen, increase, or have no effect upon competition. A merger as such involves no necessary con-

15. Robinson-Patman: "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce."

Clayton Act, § 7: "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

> notations of coercion, dominance, or lack of effective competitive pressures. In addition, mergers may ease from the market companies which have failed in the competitive struggle and thus prevent potential bankruptcies. Finally they may spur operating economies by spreading overhead costs or enabling improved technology or management."

On August 2, 1973, the National Conference of Commissioners on Uniform State Laws approved a "Uniform State Antitrust Act" which received the support of the American Bar Association's House of Delegates on February 5, 1974. In a prefatory note the Commissioners observed:

> "However, there is a diversity of economic conditions and business problems in the many different states, and practices that are undesirable on a national scale are not necessarily undesirable, or even avoidable, in local areas."[16]

An introductory note in 4 CCH Trade Regulation Reporter, ¶ 30,101, calls attention: "Note that the Act contains no specific antimerger provision * * *." Commenting on this absence, CCH Trade Regulation Report, No. 111, February 11, 1974, states:

> "The Conference observed that 'many acquisitions in small or medium size communities will or may have a restraining effect upon trade in that community but are a natural part of the economic birth, life and even death of that community.' "

California has no general antimerger act; it addresses its regulation to specific matters like mergers of intrastate airlines.[17] One can speculate that a growing, bustling state like California would pause before adopting an incipiency theory of sweeping pro-

16. The text of the Act, without the prefatory note, appears in Vol. 4, CCH Trade Regulation Reporter, ¶ 30,101. The text with the prefatory note and comments is issued by National Conference of Commissioners on Uniform State Law, 645 North Michigan Avenue, Suite 510, Chicago, Ill. 60611.

17. E.g., Passenger Air Carriers Act, California Public Utilities Code § 2758.

hibition of acquisitions of local companies by national corporations. California's concern with attempts to control local acquisition by Section 7 is illustrated by its recent Motion for Leave to File Petition for Writ of Certiorari in *People of the State of California and the Public Utilities Commission of the State of California, petitioners, v. United States of America, respondent,* No. 73-7 in this Court. Thereby it sought to terminate a suit under Section 7 brought by the United States to prevent merger of two airlines flying solely between California points. Because the airplanes flew over international waters, the petition did not address itself to the question of commerce, and the matter was later voluntarily dismissed, 414 U.S. 801 (1973). But the episode emphasizes the consideration we here present, that a federal statute, written in plain limited terms, should not be impelled into local affairs by subtleties of interpretation. Doubtless Congress can prohibit that kind of acquisition. But the question before this Court is whether Section 7 should be stretched to reach what its words do not encompass.

Before this Court now there are two different lines of argument by which it is sought to expand Section 7. One is that of the court below. The other is that of the government in *United States v. American Building Maintenance Industries,* No. 73-1689 in this Court. We consider each.

A. THE LINE OF REASONING OF THE OPINION BELOW

By the chain of reasoning discussed at pp. 18-25, above, the court below concluded that Sully-Miller was "in commerce" although it neither sells nor ships in commerce. That chain of reasoning, we submitted above, is erroneous. Every street in every city, and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road "in commerce"? By that reasoning, the local society for care of the blind, selling their brooms to the street sweeper, or the street cleaner itself, or the little tow truck operator removing illegally parked cars from

obstructing the street, all these are engaged "in commerce". We submit that such reasoning is not "guided by practical considerations" as taught in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943) and *United States v. Yellow Cab Co.*, 332 U.S. 219 (1947).

While Sully-Miller, in addition to making and selling asphaltic concrete, is also a paving contractor, it does its road and streetwork entirely in Southern California, and it does not thereby become a corporation "engaged in commerce". There is not that intimate connection between local road repair or paving and interstate commerce as there was in *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943), between actual operation and maintenance of a drawbridge over an interstate waterway and the toll road over the bridge constituting the only land interstate connection. Again, too, it is to be emphasized that a holding under the Fair Labor Standards Act concerning whether an employee is engaged in commerce is no authority for holding a company to be "in commerce" for purpose of another Act. Thus in *Kirschbaum v. Walling*, 316 U.S. 517 (1942), the Court said (pp. 520-21):

> "The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States. * * * Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.
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> "* * * The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. * * * Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law. * * *"

B. THE LINE OF REASONING OFFERED BY APPELLANT IN THE BUILDING MAINTENANCE CASE

In *United States of America v. American Building Maintenance Industries*, No. 73-1689, on appeal to this Court by the United States, a building maintenance company with branches throughout the United States acquired the shares of one Los Angeles building maintenance company and merged into itself another. Both of the acquired companies were located in Southern California and performed maintenance services solely in buildings in California. The United States sued to assail the acquisitions under Clayton Act, Section 7. The district court entered summary judgment for defendant on the ground that neither acquired company was engaged in commerce. In its Jurisdictional Statement in this Court, the government in effect argues that the words "engaged in commerce" as used in Section 7 do not mean "engaged in commerce" but mean no more than "affecting commerce" in the Sherman Act sense.

The government's argument runs that, because the acquired companies serve customers who themselves are engaged in interstate commerce, Section 7 applies.[18] It is urged that Section 7 should be given a scope as wide as the Sherman Act, that the Sherman Act reaches all activities which substantially affect interstate commerce, and, therefore, that Section 7 should be read to apply to activities which affect interstate commerce.

The argument takes a form often found in efforts to expand the reach of a statute: It lauds the purposes of Section 7 and urges

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18. There is also an argument about the acquired companies purchasing supplies received from without the state, but, as that is not an element relevant to our case, we do not discuss it.

that the social good would be furthered by the broad regulation espoused. Legislation, it is argued, should be given a scope commensurate with its aim and purpose. The answer to this kind of argument is that while legislation should be given a scope commensurate with Congress's aims and purposes, that can be so only within the area expressly circumscribed by Congress, for Congress is the judge not only of the goals but of the means to achieve them and of the compromises required to satisfy all the competing social, economic and political factors pressed upon it. In *Kirschbaum v. Walling*, 316 U.S. 517 (1942), the Court reminded us (pp. 521-22):

> "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. * * * Compare *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

The argument that Section 7 should apply wherever the acquisition may have effect on commerce founders on the fact that Section

7 specifies, not only that the acquisition must be such as may affect commerce, *but also that both acquired and acquiring corporations be "engaged in commerce"*. Efforts to go further should be addressed to Congress, where they may be subjected to consideration by the kind of machinery best adapted to the matter—legislative committees and the rest of the apparatus of the legislative process. *Lauritzen v. Larsen*, 345 U.S. 571, 593 (1953).

In the *Building Maitenance* case, the government suggests, albeit obliquely, that the words "engaged in commerce" in Section 7 should be interpreted as broadly as "affecting commerce" because "[a]t the time of the passage of the Clayton Act in 1914 the distinction between activities 'in commerce' and activities 'affecting commerce' had not been fully developed" (Jurisdictional Statement, fn. 7, p. 11). There is a twofold answer. Section 7 does contain an "affecting commerce" test in its provision about *effect*. But it *also* requires that both the corporations be "in commerce". The government's argument would simply eliminate two of the requirements and read the statute as if it contained only the one.

In the second place, whatever may have been true in 1914, by 1950 the distinction between "activities affecting commerce" and "in commerce" was stark and clear. The breadth of the Sherman Act had been stated, for example, in 1948 in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, and the contrasting limitations of the "in commerce" language in the Clayton, Robinson-Patman, and other Acts had already been expressed repeatedly, *e.g.*, *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941)[19]. In the *Bunte Bros.* case, in the passage

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19. For example, in 1943, in *Lewis v. Shell Oil Co.*, 50 F.Supp. 547, 549 (N.D. Ill.) the court had remarked, pointedly:

> "In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce."

quoted at p. 26, supra, the Court listed a whole group of statutes as evidence that when Congress wished to reach activities "affecting commerce," it knew how to do so with great clarity. Yet, in 1950, when Congress amended Section 7 extensively in order to expand its coverage in many other respects, it deliberately retained the "in commerce" language and the requirement that both the acquiring and acquired companies be "engaged in commerce".

In the *Building Maintenance* case, the government's Jurisdictional Statement quotes *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 166 (3 Cir. 1953) for a statement that by Section 7 Congress intended to go to the utmost extent of its constitutional power, just as in the Sherman Act. But the quotation is out of context. The portion of the Act there involved was that "No corporation shall acquire * * * the stock * * * of two or more corporations engaged in commerce where the effect may be * * *," etc. Transamerica Corp. had acquired the stock of many such corporations. But the acquired corporations were banks, and Transamerica argued that in the past Congress had not regulated banking business by legislation directed to corporations generally and had done so only by special banking legislation; and therefore, it argued, the language of Section 7, although express, plain, and applicable, should be contracted so as to exclude banks. It was in rejecting this argument that the court used the quoted language. What was attempted there and what is attempted here are at opposite poles. There it was sought to shrink the text of the Act from its natural coverage; here it is sought to expand it into a different kind of regulation. Neither course is permissible.

C. THERE WAS NOT EVEN AN EFFECT ON COMMERCE FROM THE ACQUISITION IN THIS CASE

Even were the argument of the government in *United States v. American Building Maintenance Industries* valid, it would not encompass the present case, for here the activity complained of had

no effect of substantially lessening competition or tending to create a monopoly in "a line of [interstate] commerce". The court below dismissed this requirement of Section 7 as going only to the merits of Copp's claims (Pet. App. 15). On the contrary, it is a jurisdictional prerequisite; and jurisdictional questions must be met and decided by the court before the trier of fact reaches the "merits" of a claim. *Wetmore v. Rymer*, 169 U.S. 115, 120-21 (1898); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-84 (1936); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936). And so it is held of the jurisdictional requirements of the antitrust Acts. *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5 Cir. 1972); *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9 Cir. 1973). In the *Rossmoor* case, the Ninth Circuit reversed a jury's specific finding that defendant's acts did not have a "substantial effect on interstate commerce or the flow of interstate commerce" and rejected the contention that the finding was conclusive of jurisdiction, saying, *inter alia*,

> "Except where the jurisdictional issue and the issues on the merits are factually 'completely intermeshed,' [citations omitted], it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed. R. Civ. P., rather than the jury's function to resolve such disputes in the trial of the case on the merits [citations omitted]." (p. 377)

In the present case the district court called on Copp to produce all the evidence it desired on the jurisdictional question, Copp did so (see p. 7, *supra*), and there was simply no genuine issue of fact on the subject. Thus, not only within its duty to pass on jurisdiction, but within F.R.Civ.P. Rule 56 the district court determined the issue. Assuming that the acquisition of Sully-Miller affected *any* kind of competition, it was not in "a line of [interstate] commerce." As the district court observed, there

were only two conceivable lines of interstate commerce. One was the exportation from California of liquid asphalt, as distinguished from asphaltic concrete. The liquid asphalt claims were left in the case, and the acquisition of Sully-Miller had nothing to do with interstate commerce in liquid asphalt (Pet. App. 6). The second conceivable "line of [interstate] commerce" was a hypothesized interstate commerce in the use of local roads, but the district court found no evidence to support any conclusion that the acquisition of Sully-Miller affected the use of roads (Pet. App. 6), saying:

> "There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968)."

CONCLUSION

The decision of the court below should be reversed, and the order of the district court reinstated, so far as they relate to the Robinson-Patman and Clayton Act claims.

Dated: San Francisco, California, June 6, 1974.

Respectfully submitted,

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